1998

Damon Hugoe, Debbie Hugoe, and Hugoe Trucking, Inc., A Utah Corporation v. Woods Cross City, A Municipal Corporation and POlitical Subdivision of The State Of Utah : Brief of Appellant

Utah Court of Appeals

Michael Z. Hayes; Todd J. Godfrey; Mazuran & Hayes; Attorneys for Defendant/Appellant.
Gregory M. Simonsen; Bryan Booth; Kirton & McConkie; Attorneys for Plaintiffs/Appellees.

IN THE UTAH COURT OF APPEALS

DAMON HUGOE, DEBBIE HUGOE, AND HUGOE TRUCKING INC., A UTAH CORPORATION,	)	CKET NO. 981502 No. 981502 CA
Plaintiffs/Appellees,	)	
vs.	)	On Assignment from the Utah Supreme Court
WOODS CROSS CITY, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF UTAH,	)	Priority 15
Defendant/Appellant.	)	

BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF
THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, UTAH
HONORABLE Judge Rodney S. Page
DATE OF ORDER: August 5, 1998
Case No. 960700425

Gregory M. Simonsen (4669)
Bryan Booth
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 328-3600
Attorneys for Plaintiffs/
Appellees

Michael Z. Hayes (1432)
Todd J. Godfrey (6094)
MAZURAN & HAYES, P.C.
2118 E. 3900 So., Suite 300
Salt Lake City, UT 84124
Telephone: (801) 272-8998
Attorneys for Defendant/
Appellant

IN THE UTAH COURT OF APPEALS

DAMON HUGOE, DEBBIE HUGOE, AND HUGOE TRUCKING INC., A UTAH CORPORATION,	)	No. 981502 CA
Plaintiffs/Appellees,	)	
vs.	)	On Assignment from the Utah Supreme Court
WOODS CROSS CITY, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF UTAH,	)	Priority 15
Defendant/Appellant.	)	

BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF
THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, UTAH
HONORABLE Judge Rodney S. Page
DATE OF ORDER: August 5, 1998
Case No. 960700425

Gregory M. Simonsen (4669)
Bryan Booth
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 328-3600
Attorneys for Plaintiffs/
Appellees

Michael Z. Hayes (1432)
Todd J. Godfrey (6094)
MAZURAN & HAYES, P.C.
2118 E. 3900 So., Suite 300
Salt Lake City, UT 84124
Telephone: (801) 272-8998
Attorneys for Defendant/
Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to a transfer from the Utah Supreme Court, in accordance with Section 78-2-3(4), Utah Code Annotated (1953, as amended). The Supreme Court of Utah has jurisdiction over this matter pursuant to Section 78-2-2(3)(j), Utah Code Annotated (1953, as amended).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in applying the doctrine of zoning estoppel? This issue presents a question of law and the trial court's decision will be reviewed for correctness. Drysdale v. Ford Motor Co., 947 P.2d 678 (Utah 1997). This issue was preserved in the City's Reply Brief in Support of its Motion for Summary Judgment and in its closing argument where objection was made to consideration of the issue of estoppel. See R. at 7, 14, 203; Transcript of Trial at p. 183.

2. Did the trial court err in finding that the City is estopped from applying its zoning regulations to Hugoes' use of their property? This issue presents a mixed question

of fact and law and the trial court's decision will be reviewed to determine if the trial court abused its discretion. Utah County v. Young, 615 P.2d 1265 (Utah 1980). This issue was preserved in the City' Reply Brief in Support of its Motion for Summary Judgment and in its closing argument where objection was made to consideration of the issue of estoppel. See R. at 7, 14, 203; Transcript of Trial at p. 183.

3. Did the trial court err in concluding that Hugoes' use of their property was permitted under the former Woods Cross City Zoning Ordinance? This issue presents a question of law and the trial court's decision will be reviewed for correctness. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992). This issue was preserved for appeal in the City's Motion for Summary Judgment and in the City's closing argument. See R. at 91, Transcript of Trial at p. 183.

4. Did the trial court err in concluding that Hugoes have a legal right to nonconforming use as a "transfer company"? This issue presents a question of law and the Court will review the trial court's decision for

correctness. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992). This issue was preserved for appeal in the City's Motion for Summary Judgment and in the City's closing argument. See R. at 91, Transcript of Trial at p. 183.

A. Is the Hugoes' use of their property consistent with the prior uses maintained on the property? This issue presents a question of law and the Court will review the trial court's decision for correctness. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992). This issue was preserved for appeal in the City's closing argument. See Transcript of Trial at p. 177, et. seq..

B. Were the Site Plan Regulations of the former City Zoning Ordinance applicable to Hugoes' use of the property? This issue presents a question of law and the Court will review the trial court's decision for correctness. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992). This issue was preserved for appeal in the City's closing argument. See Transcript of Trial at p. 177, et. seq.

5. Do the Hugoes have a vested right to use their property to park their trucks as a result of the fill permit issued by the City? This issue presents a question of law and the Court will review the trial court's decision for correctness. Heber City Corp. v. Simpson, 942 P.2d 307 (Utah 1997). This issue was preserved for appeal in the City's closing argument. See Transcript of Trial at p. 177, et. seq.

DETERMINATIVE STATUTES

The following statutes and ordinances are determinative of this appeal:

Section 10-9-103(1)(k), Utah Code Annotated (1953, as amended):

> (k) "Nonconforming use" means a use of land that:
>
> (i) legally existed before its current zoning designation;
>
> (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and
>
> (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.

Former Woods Cross City Zoning Ordinance Section 11-18-9:

SITE PLAN. In any commercial or manufacturing zone, and in all zones where construction of main buildings or dwellings other than single-family dwellings is proposed or involved, the location of main and accessory buildings on the site and in relation to one another, the traffic circulation features within the site, the height and bulk of buildings, the provision for off-street parking space, the provision for driveways for ingress and egress, and for the installation of curb, gutter and/or sidewalk when not already in place along the street bordering, and provision for other open space on the site, and the display of signs shall be in accordance with a site plan or plans or subsequent amendment thereof, approved in any case by the Planning Commission prior to issuance of a Building or Land-Use Permit. In approving site plans the Planning Commission may act on a site plan submitted to it or may act on its own initiative in proposing and approving a site plan, including any conditions or requirements designated or specified on or in connection therewith. A site plan shall include landscaping, fences, and walls designed to further the purposes of the regulations for commercial, industrial, and residential zones with two or more family dwelling units and such features shall be provided and maintained as a condition of the establishment and maintenance of any use to which they are appurtenant. In considering any site plan hereunder the Planning Commission shall endeavor to assure safety and convenience of traffic movements both within the area covered and in relation to access streets, harmonious and beneficial relation among the buildings and uses in the area covered, and satisfactory and harmonious relation between such area and contiguous land and buildings and adjacent neighborhoods.

All persons required to file a site plan under the provisions of this Section shall, at the time of the filing thereof, pay to the City a fee of $10.00 per

> acre, or any portion thereof, contained within the area covered by the site plan, with a minimum fee of $25.00, the same to cover part of the cost of processing and reviewing said site plan; provided, however, that said fee may be changed from time to time by Resolution of the City Council.

Former Woods Cross City Zoning Ordinance Title 11, Chapter 13.

This Chapter is set out in its entirety in the Appendix to this Brief.

STATEMENT OF THE CASE

This action was originally brought by the Plaintiffs Damon and Debbie Hugoe and Hugoe Trucking as an action seeking declaratory and injunctive relief. Hugoes sought to prevent Woods Cross City from enforcing its zoning ordinances to preclude the Hugoes' use of their property to park trucks from their business, Hugoe Trucking. Cross Motions for Summary Judgment were filed and were denied. The matter proceeded to trial, on the merits, on February 12, 1997, in the Second Judicial District Court, Farmington Department, in Davis County, State of Utah. The Honorable Rodney S. Page heard the evidence and issued a written Trial Ruling in favor of the Plaintiffs. Findings of Fact, Conclusions of Law, and a Judgment were entered.

Defendant then took this appeal from the trial court's Judgment.

FACTS

1. Plaintiffs Damon and Debbie Hugoe and/or Hugoe Trucking own property located within Woods Cross City, Davis County, State of Utah. Plaintiffs purchased the property, (hereinafter the "Property") in or about June, 1991. See R. at 2.

2. Prior to the Hugoes' purchase of the Property, it was used by Clarence Newman who stored trailers used in his insulation business. See Transcript of Trial at p. 19.

3. The Property was annexed into Woods Cross City in December, 1988. Prior to annexation, Hugoes' predecessor in interest, Frank Branch, had conversations with then Woods Cross City Mayor Gerald Argyle. Mayor Argyle represented to Branch that the annexation would not effect the use of the property. See Transcript of Trial at pp. 7-11.

4. No predecessor in interest of Hugoes had ever sought or received any form of land use approval from either

Davis County, or Woods Cross City. See Transcript of Trial at pp. 15, 21.

5. Prior to purchasing the Property, Debbie Hugoe went to the Woods Cross City offices to check the zoning of the Property. She obtained a copy of the Chapter of the Woods Cross City Zoning Ordinance relating to C-2 zoning, the zoning classification of the Property at that time. See R. at 249, Transcript of Trial at p. 51.

6. Shortly after purchasing the Property, Hugoes began hauling fill onto the Property. Sometime in late July or early August, 1991, the Hugoes were informed by Woods Cross City that they needed a fill permit to place fill on the Property. See R. at 250

7. On August 12, 1991, Debbie Hugoe went to the Woods Cross City offices to obtain a fill permit. While there, she spoke with Tim Stephens, the Woods Cross City Community Development Director. See R. at 250

8. At that time, Woods Cross City had recently adopted a fill permit ordinance. The City did not yet have formal policies and procedures relating to the Ordinance in place, nor did they have preprinted fill permit forms. Mr.

Stephens used a preprinted building permit form for the fill permit for the Hugoes. At that time, Mr. Stephens was aware that the Hugoes owned and operated Hugoe Trucking, Inc. See R. at 250.

9. The Trial Court found that Mr. Stephens did not inform Debbie Hugoe at that time that site plan approval was required before any use could be made of the property. See R. at 250, 251.

10. A fill permit was issued by Woods Cross City to the Hugoes on August 13, 1991. Hugoes completed the filling of their property in the Spring, 1992. See R. at 251.

11. In early 1992, the Woods Cross City Council adopted a new zoning ordinance which changed the zoning on Hugoes' property and other property in the area to I-1, light industrial. See R. at 251, 252.

12. On March 27, 1992, Hugoes received a letter from Woods Cross City informing them that the use of their property for parking trucks was in violation of the new Woods Cross City Zoning Ordinance. The letter gave Hugoes until April 20, 1992, to cease that use of the property. Hugoes refused to comply with that Order. Numerous other

demands to cease that use of the property were made, and on November 13, 1997, Woods Cross City informed Hugoes that if they did not cease that use of their property, court action would be initiated to force compliance with the City's order. As a result of that letter, the instant action was filed by the Hugoes and trial ensued. See R. at 252.

13. Hugoes have never made application for or received conditional use approval or site plan approval from Woods Cross City for the Property. See Transcript of Trial at pp. 90, 91.

SUMMARY OF ARGUMENT

The facts presented at trial were legally insufficient to support a finding of zoning estoppel. The trial court's determination that Tim Stephens, the Woods Cross Zoning Administrator, had a duty to inform the Hugoes that the use of their property was improper is incorrect as a matter of law. In addition, the trial court's decision that the City is estopped from applying its zoning ordinances to prohibit the Hugoes' use of their property contravenes significant

policy considerations that underlie the law of nonconforming uses and the law of zoning in general.

The trial court erred in this matter by applying the doctrine of zoning estoppel to the Hugoes' claims. The legal issues presented and the facts of the case should have been analyzed under the doctrine of vested rights, as pleaded. The theory of zoning estoppel was never pleaded and the issue was not tried by consent of the parties.

The trial court erred as a matter of law when it concluded that the Hugoes had a legally nonconforming use. The trial court's conclusion that Hugoes were operating a "transfer company" within the meaning of the Woods Cross City Ordinances was incorrect. Hugoes have never established a business operation on the Property and their use of the Property to park their trucks is not a use which was authorized in the former C-2 commercial zone.

The Hugoes do not have a right to continue parking large trucks on their property as a legal nonconforming use on the Property. Their use of the Property has never been legally established, and therefore, is not a use that "legally existed" before the 1992 zoning change. Their use

is not consistent with the prior uses, and even if it were, there was no evidence offered at trial to establish that the former uses were legal. Because their use represents a change in use from the preceding occupant, the City's Site Plan regulations were applicable to their use and the failure to apply for and receive Site Plan approval forecloses any claim that their use was legally established.

The trial court also concluded that the fill permit granted to the Hugoes was sufficient to grant them vested rights to the continued use of their Property to park their trucks. This conclusion is incorrect because the fill permit granted to them does not commit the Property to any particular use, and therefore, cannot form the basis of a finding that they have vested rights under Utah law.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THE CITY WAS ESTOPPED FROM APPLYING ITS ZONING REGULATIONS TO HUGOE'S PROPERTY

In Utah County v. Young, 615 P.2d 1265 (Utah 1980), the Utah Supreme Court outlined the prerequisites for invoking the doctrine of zoning estoppel. Pursuant to the test set

forth in Young, the City must have committed an act or omission upon which the Hugoes could rely in good faith in making substantial changes in position or in incurring extensive expenses. Additionally, the action must be clear, definite and affirmative. If an omission is alleged as the basis of estoppel, the omission must be a negligent or a culpable omission where the party failing to act was under a duty to act. Mere silence or inaction will not operate to work an estoppel. In addition, the Hugoes have a duty to inquire and confer with the City regarding the uses of the Property which would be permitted. Utah County v. Young, 615 P.2d 1265 (Utah 1980); Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992). Hugoes failed to sustain the burden of proof required of them to prove estoppel and the trial court erred in finding that the City was estopped from applying its zoning regulations to Hugoes' use of the Property.

The trial court determined that Tim Stephens, Woods Cross City Community Development Director, had a duty to inform the Hugoes that their use of the Property was improper, and that his failure to comply with this duty was

negligent or culpable. See R. at 239, 252. This conclusion is not supported by relevant law.

In Young, Utah County issued a building permit to the Defendant under circumstances where the issuer of the permit actually knew that Young intended to use the building in violation of the zoning regulations at issue. Despite this knowledge, the Court found that estoppel was not appropriate.

In Young, the Court cites the opinion in a case with facts more egregious than those found by the trial court in this matter. In Maloof v. Gwinnett County, 200 S.E.2d 749, 231 Ga. 164 (1973), a Georgia court found that the county was not estopped from applying its zoning regulations to prohibit the owner's use of his property as a commercial dog kennel when he had been given verbal permission by someone in the City zoning office to build the kennel. The court reasoned:

> [T]he appellants in the present case did not receive a building permit authorizing them to construct a commercial dog kennel. At the time the kennel was built the zoning regulations of Gwinnett County did not permit the operation of a commercial dog kennel on their property, and they would be presumed to know this fact. Since the zoning regulations did not prohibit the

> construction of a private kennel on the appellants' property, the erection of the kennel did not put the county authorities on notice that the zoning regulation was being violated.

Id. at 751.

A similar result was reached in Jackson v. Kenai Peninsula Borough, 733 P.2d 1038 (Alaska 1987), a case which cites the Utah Supreme Court's opinion in Young with approval. In Jackson, the Alaska Supreme Court found that application of estoppel was not appropriate where the City had issued a building permit to a landowner to build a garage in a residential zone even though the City knew of the landowner's commercial use of the property. Additionally, the court noted that the City had been aware of the landowner's use of the property for some 18 years before bringing any enforcement action.

In reviewing the issues presented by the case, the Court noted that "estoppel should be invoked against a municipality in a zoning case 'only in limited circumstances and with great caution.'" Jackson 733 P.2d 1038, 1041 (quoting Town of Greenwich v. Kristoff, 481 A.2d 77, 81, 2 Conn.App. 515 (1984)). The court further stated:

> A number of substantive policy considerations underlie this rule: (1) the defendant seeking to invoke estoppel is under at least constructive notice of the zoning ordinance he seeks to avoid; (2) the purpose of zoning is to protect the public interest and zoning regulations are drawn by representation of the public will pursuant to the political process; (3) a particular officer or individual lacks authority to waive the public's right to enforce its ordinance.

Jackson 733 P.2d at 1041 (quoting Wieck v. District of Columbia Bd. of Zoning Adjustment, 383 A.2d 7, 13 (D.C.App. 1978).

This Court has previously recognized these same policy considerations, using strikingly similar language. In Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992), the Defendant sought to prohibit the City from precluding the Defendant's use of the property because the City had previously issued business licenses for the use. This Court quoted from a previous decision of the Utah Supreme Court, stating:

> It would be unreasonable and unrealistic to conclude that a clerk or a ministerial officer having no authority to do so, could bind the county to a variation of a zoning ordinance duly passed, to which everyone has notice by its passage and publication, because a ministerial employee erred in characterizing the type of property.

***

> Similarly, the Alta town clerk's issuance in this case of three lodging facility licenses does not estop Alta from denying use of BHC's residence as a lodging facility contrary to the Alta zoning ordinance. Additionally, failure to enforce for a time does not forfeit the power to enforce.

Id. at 803.

The trial court's legal conclusion in this matter that Tim Stephens, the Woods Cross Community Development Director "had a duty to act" is contrary to the law as set forth in the cases noted above. There was no proof offered at trial that Mr. Stephens had any authority to grant land use approval or to bind the City in any way. In fact, the only evidence on this point at trial was to the contrary. See Transcript of Trial at p.127. Therefore, to the extent Mr. Stephens did fail to inform Hugoes of the relevant development requirements, such failure cannot form the basis of "reasonable reliance" as required by the applicable law.

The trial court's decision on this point also contravenes other significant legal policy implicit in the decisions of this Court and the Utah Supreme Court. If allowed to stand, the trial court's decision would render local zoning law completely ineffective by allowing the

creation of nonconforming uses and vested rights by prescription, through the inability of local government to enforce its regulation against every violation.

Utah law places the duty of becoming familiar with all the requirements of land development on the property owner. The City cannot possibly bear the burden of informing every landowner of the relevant development requirements relating to their property. While Hugoes offered testimony that they reviewed the zoning requirements relative to the C-2 zone, they offered no testimony that they reviewed the other applicable regulations of the City relating to Land Development and/or Site Plan approval. Reviewing the Utah Supreme Court's decision in Young, the Alaska Supreme Court commented:

> the Utah Court chose to place on the defendant the burden of determining whether a zoning ordinance applied to him in the absence of an affirmative assertion by the zoning authority that it did not.
>
> ***
>
> We agree with this approach. A business person in Alaska must bear a number of administrative burdens. He or she must obtain a business license, file and pay appropriate taxes, and obey all relevant laws. The burden of locating the business in an appropriately zoned site must fall on the business person.

Jackson 733 P.2d at 1042. Similarly, it follows that if a business owner must obey all relevant laws, they must obtain all necessary approvals, including site plan approval, to validly establish a business. Hugoes offered no evidence to the Court that they thus complied. To the contrary, Debbie Hugoe testified that they never sought any development approval for the Property, save the issuance of a fill permit. See Transcript of Trial at pp. 90, 91.

The trial court found, as an essential element of the estoppel analysis, that the City's "long-standing acquiescence" to the alleged zoning violations on Hugoes' property limited the necessity of Hugoes' inquiry into the relevant zoning and land development requirements. See R at 253. This conclusion is legally incorrect.

Utah Courts have repeatedly recognized that:

> Zoning Ordinances are governmental acts which rest upon the police power, and as to violations thereof any inducements, reliances, negligence of enforcement, or other like factors are merely aggravations of the violation rather than excuses or justifications therefor.
>
> ***
>
> Ordinarily, a municipality is not precluded from enforcing its zoning regulations, when its officers have remained inactive in the face of

> such violations. The promulgation of zoning ordinances constitutes a governmental function. This governmental power usually may not be forfeited by the action of local officers in disregard of the ordinance.

Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976); Utah County v. Baxter, 635 P.2d 61 (Utah 1981); Town of Alta v. Ben Hame Corp., 836 P.2d 797, 803 (quoting 8A McQuillan Municipal Corps. §25.349 (Rev. 1965)).

The trial court's legal conclusion in this regard essentially establishes a right to acquire a non-conforming use by prescription. This is completely contrary to Utah law. The general rule which has been recognized by the Courts of Utah makes it clear that a city cannot forfeit the power to enforce its zoning ordinance by any past failure to enforce, unless that failure is somehow discriminatory. Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976); Utah County v. Baxter, 635 P.2d 61 (Utah 1981); Town of Alta v. Ben Hame Corp., 836 P.2d 797, 803 (quoting 8A McQuillan Municipal Corps. §25.349 (Rev. 1965)).

A contrary rule would prove disastrous for municipalities and all local governments with limited resources. Testimony at trial indicated that Tim Stephens

is a staff of one for the purposes of zoning enforcement in Woods Cross City. If the trial court's ruling were to stand, countless zoning violations would result in the establishment of nonconforming uses due to the lack of enforcement. Even in larger municipalities with full zoning enforcement staffs, it is impossible to enforce regulations against every violation. The trial court's legal conclusion in this regard places an extraordinary burden on municipalities. The law does not require municipalities to bear such a burden.

It is also important to note that the trial court's decision in this matter essentially allows the Hugoes to use the Property free of any manner of local regulation. Testimony at trial indicated that the Hugoes' business is located in West Bountiful. Therefore, there is no business presence within Woods Cross for business licensing regulation purposes. The trial court determined that the site plan regulations found within the City's zoning ordinance were inapplicable. The trial court's decision also prohibits the City from enforcing any zoning regulations that might be applicable to the Hugoes' use of

the Property. The result is that the City is left with little or no regulatory authority to address land use issues on the Property.

The trial court's legal conclusion regarding the application of zoning estoppel is also contrary to general policy considerations relating to zoning law and nonconforming uses in particular. Nonconforming uses are disfavored and are excepted from the general rule that zoning ordinances should be strictly construed in favor of the property owner; public policy encourages the elimination of nonconforming uses because they detract from the effectiveness of comprehensive land use regulations and often result in lower property values and blight. City of Glendale v. Aldabbagh, 939 P.2d 418, 189 Ariz. 140 (Az. 1997); Lemon v. Speed, 694 So.2d 472, 96-858 La. App. 5th Cir. (La. 1997). Notwithstanding this rule of construction, the trial court construed the City's zoning regulations strictly against the City. See R. at 243. Additionally, the trial court's interpretations of the City's Zoning Regulations were legally incorrect. Therefore, the trial court's conclusion that the City was estopped from applying

its zoning regulations to the Hugoes' use of their Property is contrary to the stated policy of the law. Accordingly, the judgment of the trial court should be reversed and this Court should enter judgment in favor of the City.

II.

THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF ZONING ESTOPPEL

It was procedural error for the trial court to have considered the doctrine of estoppel. The Complaint filed by the Hugoes states two causes of action: (1) declaratory relief, alleging that they have "vested rights" and a legal nonconforming use for the current use of their Property; and (2) injunctive relief, seeking to prevent the City from prosecuting any criminal action against the Hugoes pending a decision in this matter. There is no cause of action or claim for relief based on the doctrine of zoning estoppel. The word "estoppel" does not appear anywhere in the Complaint. Notwithstanding the absence of a claim of estoppel, the trial court based its ruling on a conclusion that the City is estopped from enforcing its zoning regulations to prohibit the Hugoes' use of their Property.

Woods Cross City did not consent to the court's consideration of a claim of estoppel and consideration of the issue by the trial court was fundamentally unfair to the City. Therefore, it was improper for the trial court to base its decision on a legal theory that was not raised by the pleadings.

A. The Trial Court's Decision to Apply the Doctrine of Estoppel was Legally Incorrect.

In its Trial Ruling, the trial court stated "[I]t appears to the Court that the facts of [Western Land Equities v. City of Logan, 617 P.2d 388 (Utah 1980)] do not fit well with the facts of the present case." R. at 233. However, reference to the actual facts and this Court's opinion in Western Land indicates to the contrary.

In Western Land, a proposed developer had submitted an application and gone through a significant portion of the required hearing process on a residential subdivision application. While the application was still in process, the City attempted to enact a new zoning ordinance. The Court in Western Land chose to adopt a bright line rule for determining when rights to develop under a particular zoning ordinance vest, holding that "an applicant is entitled to a

building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a countervailing public interest." Western Land, 617 P.2d 388, 396 (Utah 1980).

Hugoes' Complaint seeks relief under a claim of "vested rights" as set forth in Western Land Equities. The issue raised by all the pleadings concerns the retroactive application of a new zoning ordinance. No claim of zoning estoppel was ever raised until it became apparent, through the process of Summary Judgment Motions, that the fill permit obtained by Hugoes was not sufficient to vest any rights to develop the Property other than those rights set forth in the City's fill permit ordinance.

The trial court's Ruling also asserts that application of Western Land would be inappropriate because Western Land is primarily concerned with the vesting of rights in instances where a zoning change is enacted before a use is made of property. However, as shown in Sections I and III below, the trial court's conclusion that the Hugoes had legally established the use of their Property prior to the

zoning change is incorrect. The Western Land property owner had started preliminary preparations of the property for development, similar to the Hugoes' filling and grading their Property. Therefore, the trial court's conclusion that the facts of Western Land do not fit well with the facts of this case is erroneous.

B. Trial of the Issue of Estoppel Absent Notice to the City and the City's Consent was Fundamentally Unfair.

The Court's decision to imply a cause of action other than that set forth within the Complaint violates fundamental issues of fairness. The City was not prepared at trial to counter arguments made, based on evidence applicable to other claims, regarding elements of "reasonable reliance" and the significance of Hugoes' expenditures.[1] No discovery was taken on these issues. In

[1] Had notice been given to the City by way of Amended Complaint, or otherwise, regarding the Court's intent to analyze Hugoes' claims under the doctrine of zoning estoppel, the City may well have chosen to present evidence relating the significance of Hugoes' expenditures and the reasonableness of their alleged reliance. The record indicates that Hugoes used fill on their property which was received from their work on City projects. No evidence was adduced as to whether or not the Hugoes paid for this fill, or whether they received it at a discounted cost. Additionally, no evidence was adduced regarding how much of the grading work was done by Hugoe trucks and what

summary, the conduct of the defense may well have been significantly different if the City had been given any notice of the manner in which the trial court would analyze Hugoes' claims. Therefore, the trial court's consideration of a claim of estoppel was improper and was an abuse of discretion.

C. The City did not Consent to Trial of the Issue of Estoppel.

Rule 15(b) of the Utah Rules of Civil Procedure states:

> When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

When evidence is introduced that is relevant to a pleaded issue, and the party against whom the amendment is urged has no reason to believe a new issue is being injected into the case, that party cannot be said to have impliedly consented

---

value was placed on such work. Such evidence would have had direct application to the trial court's determination of the significance of the expenditures. No discovery was ever conducted on these issues because they were not implicated in the Complaint.

to trial of that issue. Keller v. Southwood North Medical Pavilion, Inc., 959 P.2d 102 (Utah 1998), (quoting Domar Ocean Transp. v. Independent Refining Co., 783 F.2d 1185 (5th Cir. 1986)).

In this matter, there is no evidence that the City consented to trial of the estoppel issue. In fact, the record demonstrates to the contrary. The first appearance of any claim of estoppel is a footnote in Hugoes' Response to the City's Motion for Summary Judgment. See R. at 7, 14. The City objected to any consideration of the claim of estoppel in its Brief in Reply. See R. at 203. Additionally, the City objected to any consideration of any claim of estoppel in its closing argument. See Transcript of Trial, p. 183.[2] Finally, all of the evidence submitted to the trial court which is claimed to support the application of estoppel is relevant to the Hugoes' initial claim that the fill permit which was issued by the City gave them approval to operate Hugoe Trucking, Inc. on the

---

[2] It should be noted that while the record of this matter prepared by the trial court does contain a copy of the Transcript of Trial, that Transcript is not sequentially stamped in accordance with the rest of the record.

Property. Accordingly, there is no evidence in the record to suggest that the City ever consented to the trial of a claim of estoppel. Therefore, it was error for the trial court to have considered a claim of estoppel, and the judgment of the trial court should be reversed.

III.

HUGOES' USE OF THEIR PROPERTY IS NOT A LEGALLY NONCONFORMING USE

Utah Law defines a nonconforming use as follows:

> (k) "Nonconforming use" means a use of land that:
>
> (i) legally existed before its current zoning designation;
>
> (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and
>
> (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.

Section 10-9-103(1)(k), Utah Code Annotated.

The trial court in this matter found that the Hugoes were operating a "transfer company" within the meaning of the former Woods Cross City zoning ordinance. See R. at 254. However, Hugoes' use of their Property was never

"legally established," and therefore, cannot be a legally nonconforming use.

Chapter 13 of the former City Zoning Ordinance contained the regulations applicable to C-2 zoning, the relevant zone classification for the Hugoe's Property. Section 11-13-1 established the use regulations of the zone and set forth a detailed list of permitted and conditional uses. That Section stated:

> In Commercial Zone C-2, no building or land shall be used, and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:
>
> (Setting forth list of permitted and conditional uses).

A copy of Chapter 13 of the former City Zoning Ordinance is contained in the Appendix to this Brief. Section 11-13-2, immediately following the above-cited section, stated:

> The above-specified stores, shops or businesses shall be retail establishments and shall be permitted only under the following conditions:
>
> (Setting forth restrictions relating to the zone).

This language from the former ordinance makes it clear that uses within this zone are retail-type businesses. The evidence offered at trial in this matter established that

Hugoe Trucking is operated in West Bountiful. See transcript of Trial at p. 46, 85. The property at issue in this matter, located in Woods Cross, is used for the parking of the Hugoe's trucks. There was no testimony that Hugoes conducted any business on the Property. In fact, the testimony from Debbie Hugoe was clear that when they purchased the Property, they did so with the intention of someday putting their office there. See Transcript of Trial at p. 48.

Hugoes use of the Property is not a commercial use recognized by the former C-2 zoning regulations. At best, their use is an accessory use to a non-existent primary use. Therefore, Hugoes use of the Property to park their trucks was not permitted under the former zoning ordinance. Thus, the use was not legally established prior to the City's 1992 zoning change and therefore cannot be legally nonconforming.

In the alternative, assuming arguendo that Hugoe's use of their Property could be properly characterized as a "transfer company", that use never received proper land use approval. Therefore, the use was never legally established,

and cannot form the basis of a finding that the Hugoes had a nonconforming use.

A. The Hugoe's Use of the Property is not Consistent with the Previous Uses.

The trial court found that the Hugoe's use of the Property was consistent with the previous uses of the Property and therefore, the City site plan regulations were inapplicable. See R. at 238. Those determinations were erroneous, as a matter of law.

Testimony at trial established that the prior occupant of the Property used it to store large trailers for his insulation business. See Transcript of Trial at p. 19. Assuming the Hugoes are operating a "transfer company" on the property as they have asserted and as the trial court found, that use is obviously markedly different from the use of the Property to store insulation trailers.[3] Therefore, the trial court's conclusion that Hugoe's use of the Property was consistent with the previous uses is incorrect.

---

[3] Chapter 15 of the former City Zoning Ordinance regulated uses within the Manufacturing Zone M-2. A permitted use in that zone were Equipment Yards, contractors yard and storage. Conditional Uses included freight terminals, railway or truck.

B. The Site Plan Regulations of the Former Zoning Ordinance Were Applicable to the Hugoe's Use.

Section 11-18-9 of the former Zoning Ordinance set forth the Site Plan Regulations of the City. That Section read:

> SITE PLAN. In any commercial or manufacturing zone, and in all zones where construction of main buildings or dwellings other than single-family dwellings is proposed or involved, the location of main and accessory buildings on the site and in relation to one another, the traffic circulation features within the site, the height and bulk of buildings, the provision for off-street parking space, the provision for driveways for ingress and egress, and for the installation of curb, gutter and/or sidewalk when not already in place along the street bordering, and provision for other open space on the site, and the display of signs shall be in accordance with a site plan or plans or subsequent amendment thereof, approved in any case by the Planning Commission prior to issuance of a Building or Land-Use Permit. In approving site plans the Planning Commission may act on a site plan submitted to it or may act on its own initiative in proposing and approving a site plan, including any conditions or requirements designated or specified on or in connection therewith. A site plan shall include landscaping, fences, and walls designed to further the purposes of the regulations for commercial, industrial, and residential zones with two or more family dwelling units and such features shall be provided and maintained as a condition of the establishment and maintenance of any use to which they are appurtenant. In considering any site plan hereunder the Planning Commission shall endeavor to assure safety and convenience of traffic movements both within the area covered and in relation to access streets, harmonious and beneficial relation

> among the buildings and uses in the area covered, and satisfactory and harmonious relation between such area and contiguous land and buildings and adjacent neighborhoods.
>
> All persons required to file a site plan under the provisions of this Section shall, at the time of the filing thereof, pay to the City a fee of $10.00 per acre, or any portion thereof, contained within the area covered b the site plan, with a minimum fee of $25.00, the same to cover part of the cost of processing and reviewing said site plan; provided, however, that said fee may be changed from time to time by Resolution of the City Council.

The trial court interpreted this section in such a manner that "a site plan is needed for construction purposes, that change the character and use of the land, but not for continued use of the land, by new owners, under a previously allowable use." See R. at 238. As noted above, the trial court's conclusion that the prior uses of the Property were consistent with the Hugoe's use was incorrect.

The trial court apparently also interpreted the site plan regulations to be applicable to commercially zoned property only when a building was to be constructed. See R. at 238, Transcript of Trial at p. 178. This interpretation is also incorrect.

The first phrase of the ordinance (referring to commercial or manufacturing zones) is clearly disjunctive

from the second phrase which refers to all zones where "construction of main buildings or dwellings ... is proposed... ." This construction of the ordinance is made clear by the following provisions of the ordinance setting forth the considerations of site plan approval. Issues such as traffic circulation, provisions for off-street parking, and the display of signs are considerations that have no necessary relation to the construction of buildings. They are however, critical to the proper design of commercial or manufacturing areas. These considerations allow municipalities to appropriately plan for heavy traffic patterns associated with commercial uses and heavy equipment traffic associated with manufacturing uses. From the foregoing, it is apparent that the trial court misinterpreted the site plan regulations.

The change in use of the Property, as demonstrated above, initiated the City site plan regulations. The testimony at trial was clear that no site plan application was ever filed. Therefore, Hugoes never legally established their use of the Property.

IV.

HUGOES' DO NOT HAVE VESTED RIGHTS TO CONTINUE THE USE OF THEIR PROPERTY

The trial court's Trial Ruling suggested that the fill permit granted to the Hugoes was sufficient to validly establish their use of the Property. This conclusion is completely contrary to the reasoning that underlies the "vested rights" decision of the courts of this and other states. In Western Land Equities v. City of Logan, 617 P.2d 388 (Utah 1980), the Court held that applicants for building permits or subdivision approval have a right to expect that the rules governing their applications will not be changed mid-stream. However, the case clearly recognizes that an applicant must have committed its property to some particular use that is consistent with the current regulations.

While reviewing the general elements of a claim of zoning estoppel, the Western Land court stated:

> An additional requirement generally considered in zoning estoppel cases is that of the existence of some physical construction as an element of substantial reliance. Preconstruction activities such as the execution of architectural drawings or the clearing of land and widening of roads are not sufficient to create a vested right, nor generally

> are activities that are not exclusively related to the proposed project.

Western Land, 617 P.2d 388, 392.

In this matter, the fill permit granted to the Hugoes did nothing to commit the Property to any particular use. Additionally, their use of the Property, whether as a "transfer company" or otherwise, was not consistent with the zoning ordinance. Accordingly, Hugoes do not have vested rights to any use of the Property.

CONCLUSION

For any or all of the foregoing reasons, the City requests that the judgment of the trial court be reversed and that this Court direct the entry of a judgment holding that the City is not estopped from applying its current zoning regulations to preclude the Hugoes' use of their Property as a parking or storage yard for their trucks and that the Hugoes do not have any vested right to their current use of the Property.

DATED this 20th day of January, 1999.

MAZURAN & HAYES, P.C.

By: _____
Todd J. Godfrey
Attorneys for Defendant
Woods Cross City

CERTIFICATE OF MAILING

I certify that I caused two true and correct copies of the foregoing BRIEF OF APPELLANT to be mailed first class, postage prepaid, on this 30th day of January, 1999 to the following:

Gregory M. Simonsen
Kirton & McConkie
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145

A D D E N D U M

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
DAVIS COUNTY, STATE OF UTAH
FARMINGTON DEPARTMENT

DAMON HUGOE, DEBBIE HUGOE, and, HUGOE TRUCKING, INC., a Utah corporation Plaintiffs, v. WOODS CROSS CITY, a municipal corporation and political subdivision of the State of Utah, Defendant.	**TRIAL RULING** Case No. 960700425

This matter came before the Court for trial to the Court on February 12, 1997. Plaintiffs were represented by Gregory Simonsen and Bryan Booth. The defendant was represented by Michael Hayes and Todd Godfrey. After the presentation of evidence and argument, the Court took the case under advisement to prepare a written opinion. The Court rules as follows:

FINDINGS OF FACT

Plaintiffs' property and that of Mr. Richard Fleming lie adjacent to one another on the south side of 500 South at approximately 1300 West in Woods Cross City. 500 South is a major East-West thoroughfare in the city.

Both parcels were previously owned by Mr. Frank Branch. In December of 1988 both parcels were annexed into Woods Cross City.

Prior to December 1988 the property was located in the unincorporated area of Davis County. Mr. Fleming purchased his parcel from Mr. Branch in 1985. He obtained permission

from Davis County to place a culvert in front of his property to allow better access and to haul in fill. Much of the fill was hauled onto the property from Davis County retention basins as a result of the 1983 flooding.

Mr. Fleming is in the construction business. Since he purchased the property in 1985, he has used it continuously to park dump trucks, belly dumps and various other pieces of heavy equipment.

Mr. Branch retained ownership of the parcel now owned by the plaintiff. Over the years from at least 1985 until 1991, Mr. Branch allowed Mr. Clarence Newman to use the property. Mr. Newman was in the insulation business and used the property to park semi-trucks and trailers and large insulation trucks.

The use of the two parcels for truck and equipment parking was open and obvious and clearly observable to anyone traveling on 500 South. The use continued from at least 1985 until present.

In the year leading up to annexation of the property into Woods Cross City, Mr. Branch and Mr. Fleming had several conversations with the then mayor, Mr. Argyle, and attended several public meetings where they were encouraged to consent to annexation, with the assurance that they would be able to continue the current use of their property. Ms. Hugoe also attended some of these same meetings with her aunt, also a resident of the area.

Prior to June 1991 plaintiffs became interested in the property and Ms. Hugoe went to the Woods Cross City offices to check the zoning of the property. She spoke with Mr. Stephens, the Community Development Director. He gave her a copy of the zoning ordinance, which showed

the property was in a C-2 zone. She noted that a permitted use in that zone was a "transfer company."

Mr. Stephens had been employed as the Community Development Director for Woods Cross City since 1989. Before that he worked in the planning department of Davis County. In his position with Davis County he was familiar with the unincorporated area of the county.

Ms. Hugoe told Mr. Stephens that they were a trucking company. Trucks bearing the Hugoe Trucking logo were often on the streets of Woods Cross City. Hugoe Trucking had been used on several road construction jobs in the city hauling road base and "roto-mill" to and from the road projects. Mr. Stephens was aware that the Hugoes were involved in a trucking business.

Ms. Hugoe inspected the property and the adjacent area and observed that the property was being used for truck and equipment parking that seemed to be consistent with the zoning use.

Plaintiffs purchased the property on June 11, 1991 and immediately began parking their trucks on their property.

Shortly after purchase they began hauling fill onto the property, some of it from projects they were working on in the city. A Scott Anderson from the city informed Ms. Hugoe that they needed a fill permit to place fill on the property.

On August 12, 1991 Ms. Hugoe went to the Woods Cross City offices to get a fill permit. She talked to Mr. Stephens; he informed her that the city had just adopted the fill ordinance and they were still in the process of setting up policies and procedures. They did not have a fill permit form yet so Mr. Stephens used a building permit form. They discussed the type of fill

they were using and that it was coming from city streets and other sources. He said it could not contain wood or concrete. He was aware that they were a trucking company.

Ms. Hugoe testified that Mr. Stephens said nothing about plaintiffs not being able to use the property for parking trucks or that they needed a site plan.

Mr. Stephens said he could not remember discussing that with her but conveniently produced a memo to the file stating he told her that she needed a site plan and gave her a site plan application.

The permit itself makes no mention of the site plan requirement or any particular use, and the comment portion of the permit is blank. The fill permit was signed by Mr. Stephens on August 13, 1991, the same date that the memo to the file bears.

Plaintiffs proceeded to complete the fill of the property hauling in approximately 100 truck loads of fill, which was topped by other materials to provide a smooth surface for the parking of their trucks. The value of the fill and the work performed to grade it and finish it was over $100,000.

All fill was completed by Spring of 1992. At all times after their purchase of the property they continued to park trucks on their property. When the fill operation temporarily required them to move their trucks they parked them on the Fleming property next door.

Use of the property by plaintiff to park trucks was consistent with other property uses in the area. Use of the property in the area for commercial and industrial purposes has changed very little over the years.

In the early part of 1992, Woods Cross City adopted a new zoning ordinance which changed the zoning on plaintiffs' property and other property in the area to I-1, light industrial.

On March 27, 1992, plaintiffs received a letter from Woods Cross City informing them for the first time that the use of their property for parking trucks was in violation of the new zoning ordinance. The letter gave plaintiffs until April 20, 1992 to cease and desist. Plaintiffs refused to comply with the order and after numerous demands over the years, on November 13, 1997, defendant's attorney sent a letter to plaintiffs. The letter stated that unless they complied within 14 days court action would be started to force compliance.

As a result of that letter this action was filed by plaintiffs and this trial ensued.

From the foregoing findings of fact, the Court rules as follows:

RULING

Plaintiffs claim they are entitled to continue the use they now make of the property, which consists primarily of a storage yard for their trucks and trailers, through the operation of estoppel, occasioned by defendants acts and omissions, as a non-conforming use under the defendants' new zoning ordinance. Plaintiff also must prove the use of their land meets the legal requirements to be considered a non-conforming use. Therefore, although both issues are interrelated, the Court will address the estoppel issue first, as a determination in plaintiffs' favor on the estoppel issue helps satisfy one of the elements required under non-conforming use.

ESTOPPEL

Current Utah law relating to zoning estoppel is primarily set forth in two opinions of the Utah Supreme Court: Utah County v. Young, 615 P.2d 1265 (Utah 1980); and Western Land Equities v. City of Logan, 617 P.2d 388 (Utah 1980). Peculiarly, although the two cases were released only one month apart, there is no mention in either of the other, although the issues discussed often overlap. Western Land, the latter of the two, discusses the law of zoning

estoppel as if no Utah court, let alone the very same court a mere one month prior, had ever addressed the issue, citing case law from other jurisdictions in illustrating possible approaches to the issue. The Western Land Court ultimately concludes that an application of zoning estoppel would not be correct in that case, proceeding instead to analyze the case under a "vested right" theory, certainly related, but not quite the same. The Court states:

> In rejecting the zoning estoppel approach in this matter, we are not prepared to state that it would never be relevant to a determination of the validity of a retroactive application of a zoning ordinance. We are of the view, however, that the relevant public and private interests are better accommodated in the first instance by a different approach.

Western Land, 617 P.2d at 392-393. The Court then proceeds to discuss how and when property owners' rights to a particular use might vest. In Western Land, the facts were that the owner had purchased the land, and then, before any construction or other use of the property commenced, the city amended its zoning ordinance, precluding the use for which the owner had intended for the property. Rejecting a balancing-test type approach based on a weighing of the resources which an owner has committed to a project against the possibility of other appropriate uses of the land and the public welfare, the Court held that:

> [A]n applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest. Furthermore, if a city or county has initiated proceedings to amend its zoning ordinances, a landowner who subsequently makes application for a permit is not entitled to rely on the original zoning classification.

Id., at 396. It appears to the Court that the facts of Western Land do not fit well with the facts of the present case. Here, there is no dispute that a permit was indeed issued, rather than simply applied for, although the parties dispute that permit's relevance. Plaintiffs do not seek, in this

action, a building permit at all, rather they seek a determination that the use they presently make of their property is legally non-conforming under the current zoning ordinance. Furthermore, as found by the Court, the property was used the same before the ordinance was changed as it is presently. As stated above, and addressed more fully below, to be currently legal as non-conforming, it must have been allowable under the prior zoning ordinance. The case that is most directly controlling with respect to that issue is Utah County v. Young (*supra*). There the Supreme Court directly addressed the issue of estoppel in a zoning case. There was no intervening zoning change, as there was in Western Land, and as there is in this case, yet the intervening zoning change is only a secondary issue in this case if the Court finds the use legal under the prior zoning law.

The facts of Young are essentially as follows: The landowners owned property zoned for agricultural use only. They applied to the county for a building permit, for a "J"-type non-residential, non-public use building, such that would include a barn. The permit was issued for the construction of a barn, with an estimated value of $1,600. The landowners thereafter proceeded to construct a building which, although resembling a barn, included an auction block, bleachers, commercial plumbing and wiring, and which cost $23,000, and began operating a livestock auction. The trial court found that at the time the landowners applied for their building permit, and all through the intervening time until the county brought the action, the landowners "knew that such a use would not be permitted under the zoning laws, and no agent or employee of Utah County led them to believe otherwise." The trial court stated on the matter:

> The only defense presented by the defendants was that they were entitled to the application of equitable principles to prevent the county from enjoining his use and operation of the land as a commercial 'Auction Barn' because of claimed

> misleading acts inducing his belief that on completion of the structure he would be entitled to commercial use of it. The findings of the advisory jury, concurred in by the Court, do not support any such misleading action, and to the contrary establish that the defendants well-knew the zoning restrictions, and that they precluded commercial use of the structure. Therefore, the rules of equity do not assist them in their claim and the right of plaintiff to a permanent injunction prohibiting further commercial use of the property is granted by the Court.

Young, 615 P.2d at 1266-67. The landowners claimed that even though they had knowledge of the zoning laws, the alleged misleading actions of the building inspector should have entitled them to an estoppel. On three grounds the Supreme Court ruled against the landowners. First, the trial court found that there was no misleading by the county's agents. Second, the Supreme Court stated:

> [T]he structure, itself, which resembles a barn, does not violate the zoning laws; it is only the commercial use thereof that is proscribed. Third, as a matter of law, estoppel may not be used as defense by one who has acted fraudulently, or in bad faith, or with knowledge.

Id., at 1267. The Court goes on to establish the elements of a claim of estoppel in a zoning case as follows:

> To invoke the doctrine the county must have committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses. The action upon which the developer claims reliance must be of a clear, definite and affirmative nature. If the claim be based on an omission of the local zoning authority, omission means a negligent or culpable omission where the party failing to act was under a duty to do so. Silence or inaction will not operate to work an estoppel. Finally, and perhaps most importantly, the landowner has a duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted.

Id., at 1267-68. The Supreme Court found no abuse of discretion and affirmed the trial court's judgment against the landowners.

Here, the facts, as stated, *supra*, would show an entirely different scenario than those at issue in Young. The property in question had been historically used, first in Davis County, and later, after being annexed into defendant Woods Cross, for the parking of trucks, the same use for which defendant seeks an injunction. It had been so used, on a continuous basis, known to both

Davis County and defendant, for at least 6 years prior to the time it was purchased by plaintiffs. The surrounding property owners had made similar use of their (identically-zoned) land. Defendants' mayor had induced the prior owners of plaintiffs' land to agree to the annexation with the assurances that they could continue using the land in the manner which that prior owner, and current plaintiffs, were using it. Plaintiffs went to defendant's offices and reviewed the zoning ordinance, and reasonably believed (as set forth, *infra*) the use they wished to put the land to would be allowed. After purchasing the land and continuing to use it as it had been historically used, plaintiffs began to put fill on the land to make it more acceptable for the parking of their trucks. Part of this fill came from the rotograding of defendant's streets, a fact known to defendant.

They were then contacted by defendant and told that they needed to get a "fill permit" before continuing to place the fill, but, significantly, they were not told that they could not park their trucks on the land. Plaintiff Debbie Hugoe then went to the defendant's offices and procured the "fill permit" from Tim Stephens, defendant's director of community development. Mr. Stephens was fully aware that plaintiffs owned and operated a trucking company, that they parked their trucks on the subject property, and that they were obtaining the fill permit to improve the conditions on that property for such truck parking.

There is a conflict in the evidence as to whether Mr. Stephens told Ms. Hugoe that they needed a site plan. Ms. Hugoe stated that there was no such mention. Mr. Stephens says he can't remember, but he conveniently produced a memo to the file referring to a conversation about the site plan.

The Court finds it inconsistent that an event that was so important that it triggered a memo to the file would not have likewise triggered at least a notation or comment on the fill permit. The fill permit was signed by Mr. Stephens on the same date as the file memo but is silent on the issue. The comment portion is blank.

After obtaining the "fill permit," plaintiffs continued to place fill on the property, eventually placing fill and performing grading, all with a value well over $100,000. It was only as this work was being completed that defendant informed plaintiffs of the recent zoning change that prohibited the use plaintiffs were making of their property. Defendants argue that no site plan had been approved, no building permit issued, and that plaintiffs use therefore could not have been "lawfully existing" prior to the zoning change. As support, they cite Western Land. The Court finds little credence in their argument for several reasons. First, as set forth, *supra*, Western Land is primarily concerned with the vesting of rights in instances where a zoning changes before a use is made of a property, a scenario different than that before the Court.

Second, the "fill permit" issued by defendant was issued long after the current use was made of the property, and was only obtained for leveling off and making the property more serviceable under its current (and prior) use. Plaintiffs needed no building permit to use the land in the manner in which it had always been used, in fact there were no "buildings" needed whatsoever. As to defendant's argument that a "site plan" was needed to be legal, the Court

cannot agree. The only thing that changed when ownership changed was the name and shape of the trucks being parked on the land. There are no allegations that Davis County, the prior zoning authority, had required a site plan and that there had been a failure to comply. There is no evidence before the Court that the use had ever, prior to 1992, been questioned by any authority as being anything but proper. Certainly defendants do not require a site plan every time a business property is sold and new owners use the property for essentially the same purpose, without major change. When minor changes are sought, a building permit, not a site plan, is required. The language of the site plan ordinance is telling in this regard:

> SITE PLAN. In any commercial or manufacturing zone, and in all zones where construction of main buildings or dwellings other than single-family dwellings is proposed or involved, the location of main and accessory buildings on the site and in relation to one another, the traffic circulation features within the site, the height and bulk of buildings, the provisions for off-street parking space, the provisions for driveways for ingress and egress, and for the installation of curb, gutter and /or sidewalk when not already in place along the street bordering, and provision for other open space on the site, and the display of signs shall be in accordance with a site plan or plans or subsequent amendment thereof, approved in any case by the Planning Commission prior to the issuance of a Building or Land-Use permit. . .

(Section 11-18-9 of defendants' former City ordinances. This is the text submitted by defendant as part of their reply memorandum to their motion for summary judgment.) It is clear that a site plan is needed for construction purposes that change the character and use of the land, but not for continued use of the land, by new owners, under a previously allowable use.

Third, and finally, even if the Court was to proceed under Western Land, it is undisputed that plaintiff applied for, and obtained a "fill permit." The fill permit was granted with defendant's knowledge that plaintiff was using the fill to be able to better park his trucks, a use that had gone on for years prior. This Court can see no reason to limit the holding of Western

Land to only building permits and subdivision approvals. Other types of permits may reference the same type of rights, such as the liquor license in Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689 (Utah 1979). Defendant required plaintiffs to obtain a fill permit to place fill, fill that plaintiffs felt was necessary to make better, but the same, use of their property. The permit was obtained, and plaintiffs continued the same use thereafter. As plaintiffs actually obtained the only type of "building permit" either party reasonably might argue was ever at issue in this case, with the full knowledge of defendant that the prior use would be continued, Western Land cannot but help plaintiffs' case, to the extent that it applies.

Reviewing the elements of estoppel set forth by Young, defendant must have:

1. Committed an act or omission, and if an omission, it must be a negligent or culpable omission, where the party failing to act was under a duty to do so.

The Court finds that Mr. Stephens, in first requiring and then issuing a fill permit to plaintiffs, knowing full well the use to which the property was being put and would be put in the future, without telling plaintiffs that there was any problem with that use, or noting the same on the fill permit, constitutes a negligent omission by one who had a duty to act. Mr. Stephens' omission was not mere silence or inaction, as may have been the case in Young. He had personal knowledge of the use of the property, a use which had never been questioned by defendants, and a use which could reasonably be allowed under the then current zoning ordinance. If he had questions or believed that use to be improper, then was the time to speak, not after plaintiffs had expended substantial resources.

2. Good faith reliance on the act or omission in making substantial changes in position or incurring extensive expenses.

The Court finds that there is evidence only of good faith on the part of plaintiffs. Plaintiffs had no knowledge that there was even a potential problem with their land use until defendants informed them of the zoning change after significant resources had already been committed to the fill project. The Court also rules that the expenses, with a value greater than $100,000, outlaid by plaintiffs in such reliance were "extensive."

3. Duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted.

Plaintiff went to defendant's offices and reviewed the local zoning ordinance before purchasing the property. The specific language of the zoning ordinance itself caused her to reasonably believe that the use, a use to which the property had been put by the prior owners, would be allowed. Knowing that the prior owners, as well as the surrounding property owners used their identically zoned property in the same or similar manner, with defendant's longstanding acquiescence, a review of the ordinance must have seemed nothing more than a formality to plaintiffs.

The Court cannot envision how, under the facts of this case, plaintiffs would have had a further duty to "inquire and confer" with the local zoning authority to be sure they could use the property the same way it had been historically used, the same way surrounding property owners used their property, especially in light of the zoning ordinance's seeming express approval of such use.

The Court therefore finds that plaintiffs have met the elements required by Young to estop defendant from arguing (or prosecuting plaintiff in a criminal or administrative case) that plaintiffs' use of their property was not legally conforming to the prior zoning ordinance.

Legal Non-Conforming Use

To enable plaintiffs to prove they are entitled to continue their use, a use which is indisputably not allowed as a conforming use under the current zoning ordinance, they must show that it meets the requirement to be a non-conforming use under the applicable law. Utah Code Ann. § 10-9-103(k) states:

> (k) "Nonconforming use" means a use of land that:
>
> (I) legally existed before its current zoning designation;
>
> (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and
>
> (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.

The Court's finding as to the first element is set forth in the prior section, *supra*. As an independent, but interrelated as it goes to the issue of plaintiffs' reasonable belief under estoppel, grounds for finding the first element required for a non-conforming use, the Court sets forth the following: Under the zoning ordinances in effect at the time plaintiffs purchased their property and when they began their current use, their land was zoned "C-2." Permitted uses under C-2 include "transfer company." The parties are in disagreement as to the definition of a "transfer company." The zoning ordinance itself provides no definition of "transfer company," neither is it defined by Utah statutory or case law. The Court found one case, from Missouri, that attempted to define its meaning. The court in Armco Steel, v. City of Kansas City, Missouri, 883 S.W.2d 3, 8-9 (Mo. 1994) states:

> The term "transfer company" is defined as "a transportation company that transfers passengers or baggage usually for a short distance between specified points or terminals." Webster's Third International Dictionary (Unabridged) at 2427. In a

> broader sense used to describe certain litigants in Missouri case law, a transfer company includes any company in the business of transporting freight or other products for hire. *See, e.g.*, State ex rel. Beaufort Transfer Co., 610 S.W.2d 96 (Mo. App. 1980); Govreau v. Farmington Transfer Co., 473 S.W.2d 750 (Mo. App. 1971); Mason v. F.W. Strecker Transfer Co., 409 S.W.2d 267 (Mo. 1966).

In Utah, there have been several cases dealing with "transfer companies." Sims v. Public Service Commission 117 Utah 516; 218 P.2d 267 (Utah 1950) dealt with the "Salt Lake Transfer Company" and its permit as a contract motor carrier to haul sugar for the "Utah-Idaho Sugar Company" between West Jordan and Salt Lake City, Utah. Murphy, dba Alex Pickering Transfer Company, v. Public Service Commission, 514 P.2d 804 (Utah 1973) dealt with a permit dispute against the Utah P.S.C. by a contract carrier. Ostler V. Albina Transfer Company, Inc., 781 P.2d 445 (Utah Ct. App. 1989) is a personal injury action discussing an accident involving a "truck and semitrailer unit parked on the paved shoulder of the roadway."

Plaintiff Hugoe Trucking, Inc. is a contract motor carrier licensed by the Interstate Commerce Commission and the State of Utah. It is the Court's ruling that Hugoe Trucking is a "transfer company" within the meaning of defendants' prior zoning ordinance. Defendants would like to persuade the Court that the proper classification of plaintiffs' use of their property is one found under zone "M-2," at (E), "Equipment yards, contractor's yard and storage." Apparently this is as a result of Hugoe trucking's frequent work with contractors, hauling construction materials. The only evidence before the Court is that plaintiff Hugoe Trucking is not, and never has been, a contractor.

It is clear that under Utah law:

> [Z]oning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses

> should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.

Patterson v. Utah County Board of Adjustment, 893 P.2d 602, 606 (Utah Ct. App. 1995). Plaintiff Hugoe Trucking is a trucking, and thus, "transfer" company. Nowhere in the prior zoning ordinance is there a specific mention of any zone designated for "trucking company." The only possibility is under "transfer company." The Court therefore finds that the use of plaintiffs' property prior to the zoning change was "legally existing."

It has not been argued by the parties, and is thus apparently not at issue, but the Court also finds that the use was "maintained continuously since the time the zoning regulation governing the land changed." There was a period of time when plaintiffs trucks were parked off-site to enable the filling and grading process, yet such would not constitute a "discontinuance." The Court has been unable to find Utah case law on the issue, but a State of Washington case dealing with discontinuance in a non-conforming use stated:

> The mere temporary cessation of a nonconforming use, however, does not effect abandonment or discontinuance of the nonconforming use. 8A E. McQuillin, The Law of Municipal Corporations @ 25.196 (3d ed. rev. 1976).

Andrew v. King County, 586 P.2d 509, 513 (Wash. Ct. App. 1978). Therefore, to the extent that it is at issue, the Court rules that plaintiffs' use was "maintained continuously since the time the zoning regulation governing the land changed."

The third element is not disputed by the parties. Therefore, the Court would find that plaintiffs' current, and past, use of their property is a legal non-conforming use. As such, the Court would find in favor of plaintiffs and enjoin any further action by defendant not consistent with this ruling.

Plaintiffs' counsel is directed to prepare findings and judgment in accordance with the Court's Ruling and send a copy to opposing counsel at least 5 days before being submitted to the Court for signature.

Dated May 19th, 1998

BY THE COURT:

Rodney S. Page

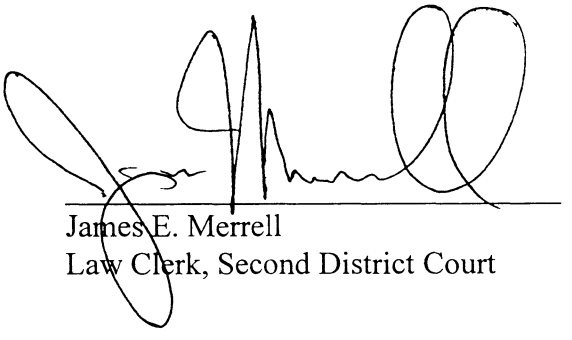
RODNEY S. PAGE
DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on May 19th, 1998, postage prepaid, to the following:

Gregory M. Simonsen
Clark B. Fetzer
Attorneys for Plaintiffs
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Michael Z. Hayes
Attorney for Defendant
1245 Brickyard Road No. 250
Salt Lake City, Utah 84106



James E. Merrell
Law Clerk, Second District Court

245

Gregory M. Simonsen (#4669)
Bryan H. Booth (#7471)
KIRTON & McCONKIE
Attorneys for Plaintiffs
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR

DAVIS COUNTY, STATE OF UTAH

DAMON HUGOE, DEBBIE HUGOE, and HUGOE TRUCKING INC., a Utah corporation, Plaintiffs, vs. WOODS CROSS CITY, a municipal corporation and political subdivision of the State of Utah, Defendant.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT** Civil No. 960700425 Judge Rodney S. Page

This matter came before the Court for trial to the Court on February 12, 1997. Plaintiffs were represented by Gregory Simonsen and Bryan Booth of the law firm of Kirton & McConkie. The defendant was represented by Michael Hayes and Todd Godfrey of the law firm of Mazuran & Hayes. After the presentation of evidence and argument, the Court took the case under advisement

to prepare a written opinion. On May 19, 1998, the Court issued a Trial Ruling in favor of plaintiffs. The Court now enters these Findings of Fact, Conclusions of Law, and Judgment.

I. FINDINGS OF FACT

1. Plaintiffs' property and that of Mr. Richard Fleming lie adjacent to one another on the south side of 500 South at approximately 1300 West in Woods Cross City, Davis County, Utah. The street known as 500 South is a major East-West thoroughfare in the city.

2. The legal description of Plaintiff's property is as follows:

> Beginning at a point 238.3 feet West and 181.5 feet South and 627 feet West and North 0°26' East 330 feet and West 235.8 feet from the Northeast corner of Section 26, Township 2 North, Range 1 West, Salt Lake Meridian; and running thence West 65 feet; thence South 670.14 feet to the North line of a street; thence East 65 feet along said street; thence North 670.14 feet to the point of beginning.
> AND
> Beginning at a point 238.3 feet West and 181.5 feet South and 627 feet West and North 0°26' West and North 0°26' East 330 feet and West 105.8 feet from the Northeast corner of Section 26, Township 2 North, Range 1 West, Salt Lake Meridian; and running thence West 65 feet; thence South 670.14 feet to the North line of a street; thence East 65 feet along said street; thence North 670.14 feet to the point of beginning.
> ALSO:
> Beginning at a point 238.3 feet West and 181.5 feet South and 627 feet West and North 0°26' East 330 feet and West 170.8 feet from the Northeast corner of Section 26, Township 2 North, Range 1 West, Salt Lake Meridian; and running thence West 65 feet; thence South 670.14 feet to the North line of a street; thence East 65 feet along said street; thence North 670.14 feet to the point of beginning.
> ALSO:
> Beginning at a point 238.3 feet West and 181.5 feet South and 660 feet West from the Northeast corner of Section 26, Township 2 North,

Range 1 West, Salt Lake Meridian; and running thence North 330 feet; thence West 72.8 feet; thence South 330 feet; thence East 72.8 feet to the point of beginning.

Hereafter this parcel shall be referred to as "the property" or "plaintiffs' property."

3. Both plaintiffs' parcel and Mr. Fleming's parcel were previously owned by Mr. Frank Branch.

4. In December of 1988 both parcels were annexed into Woods Cross City. Prior to December 1988, the property was located in the unincorporated area of Davis County.

5. Mr. Fleming purchased his parcel from Mr. Branch in 1985. Mr. Fleming obtained permission from Davis County to place a culvert in front of his property to allow better access and to haul in fill. Much of the fill was hauled onto the property from Davis County retention basins as a result of the 1983 flooding.

6. Mr. Fleming is in the construction business. Since he purchased the property in 1985, he has used it continuously to park dump trucks, belly dumps, and various other pieces of heavy equipment.

7. Mr. Branch retained ownership of the parcel now owned by the plaintiff. Over the years from at least 1985 until 1991, Mr. Branch allowed Mr. Clarence Newman to use the property. Mr. Newman was in the insulation business and used the property to park semi-trucks and trailers and large insulation trucks.

8. The use of the two parcels for truck and equipment parking was open and obvious and clearly observable to anyone traveling on 500 South. The use continued from at least 1985 until present.

9. In the year leading up to annexation of the property into Woods Cross City, Mr. Branch and Mr. Fleming had several conversations with the then Woods Cross City mayor, Mr. Argyle, and attended several public meetings where they were encouraged to consent to annexation, with the assurance that they would be able to continue the current use of their property. Ms. Debbie Hugoe also attended some of these same meetings with her aunt who was a resident of the area.

10. Prior to June 1991 plaintiffs became interested in purchasing the property, and Ms. Hugoe went to the Woods Cross City offices to check the zoning of the property. She spoke with Mr. Tim Stephens, the Community Development Director. He gave her a copy of the zoning ordinance, which showed the property was in a C-2 zone. She noted that a permitted use in that zone was a "transfer company."

11. Ms. Hugoe told Mr. Stephens that she operated a trucking company. Trucks bearing the Hugoe Trucking logo were often on the streets of Woods Cross City. Hugoe Trucking had been used on several road construction jobs in the city hauling road base and "roto-mill" to and from the road projects. Mr. Stephens was aware that the Hugoes were involved in a trucking business.

12. Ms. Hugoe inspected the property and the adjacent area and observed that the property was being used for truck and equipment parking that seemed to be consistent with the zoning use.

13. Plaintiffs purchased the property on June 11, 1991 and immediately began parking their trucks on their property.

14. Shortly after purchase, plaintiffs began hauling fill onto the property, some of it from projects they were working on in Woods Cross City. A Scott Anderson from the city informed Ms. Hugoe that they needed a fill permit to place fill on the property.

15. On August 12, 1991 Ms. Hugoe went to the Woods Cross City offices to obtain a fill permit. She talked to Mr. Stephens about the permit. Mr. Stephens informed her that the city had just adopted the fill ordinance and was still in the process of setting up policies and procedures. The city had not yet designed a preprinted fill permit form, so Mr. Stephens used a preprinted building permit form. Mr. Stephens and Ms. Hugoe discussed the type of fill plaintiffs were using and that the fill was coming from city streets and other sources. He was aware that Ms. Hugoe's business, Hugoe Trucking, Inc, was a trucking company.

16. At trial there was conflicting evidence as to whether Mr. Stephens told Ms. Hugoe that a site plan was required for the property. The court having weighed the credibility of the witnesses and the evidence finds that Ms. Hugoe's testimony that no site plan was discussed is the

25

most credible. Hence, the court finds that Mr. Stevens did not tell Ms. Hugoe of any site plan requirement.

17. The fill permit issued to Ms. Hugoe by Woods Cross City makes no mention of the site plan requirement or any particular use, and the comment portion of the permit is blank. The fill permit was signed by Mr. Stephens on August 13, 1991.

18. Plaintiffs proceeded to complete the fill of their property by hauling in approximately 100 truck loads of fill which was topped by other materials to provide a smooth surface for the parking of plaintiffs' trucks. The value of the fill and the work performed to grade it and finish it was over $100,000.

19. The filling of the property was completed by Spring of 1992. At all times after their purchase of the property, plaintiffs continued to park trucks on their property. When the fill operation temporarily required them to move their trucks, plaintiffs parked their trucks on the neighboring Fleming property.

20. The plaintiffs' use of the property to park trucks was consistent with other property uses in the area. Use of the property in the area for commercial and industrial purposes has changed very little over the years.

21. In the early part of 1992, Woods Cross City adopted a new zoning ordinance which changed the zoning on plaintiffs' property and other property in the area to I-1, light industrial.

22. On March 27, 1992, plaintiffs received a letter from Woods Cross City informing plaintiffs for the first time that the use of their property for parking trucks was in violation of the new zoning ordinance. The letter gave plaintiffs until April 20, 1992 to cease and desist. Plaintiffs refused to comply with the order, and after numerous demands over the years, defendant's attorney sent a letter to plaintiffs on November 13, 1997. The letter stated that if plaintiffs did not comply within 14 days, court action would be initiated to force compliance.

23. As a result of that letter this action was filed by the plaintiffs and this trial ensued.

From the foregoing findings of fact, the Court makes the following conclusions of law.

II. CONCLUSIONS OF LAW

1. The Court finds that the plaintiffs have established the elements for zoning estoppel set forth in *Utah County v. Young*, 615 P.2d 1265 (Utah 1980).

2. The Court finds that Mr. Stephens' actions in first requiring and then issuing a fill permit to plaintiffs, knowing full well the use to which the property was being put and would be put in the future, without telling plaintiffs that there was any problem with that use, or noting the same on the fill permit, constitute a negligent omission by one who had a duty to act. Mr. Stephens' omission was not mere silence or inaction, as may have been the case in *Young*. He had personal knowledge of the use of the property, a use which had never been questioned by defendant, and a use which could reasonably be allowed under the then current zoning ordinance. If he had questions or

believed that use to be improper, then was the time to speak, not after plaintiffs had expended substantial resources.

3. The Court also concludes that there is evidence only of good faith on the part of the plaintiffs. Plaintiffs had no knowledge that there was even a potential problem with their land use until defendant informed them of the zoning change after significant resources had already been committed to the fill project. The Court also rules that the expenses, with a value greater than $100,000, outlaid by plaintiffs in such reliance were "extensive."

4. The court also finds that plaintiffs inquired and consulted zoning authorities and reviewed zoning ordinances regarding use of the property. Ms. Hugoe went to defendant's offices and reviewed the local zoning ordinance before purchasing the property. The specific language of the zoning ordinance itself caused her to reasonably believe that the use, a use to which the property had been put by the prior owners, would be allowed. Knowing that the prior owners, as well as the surrounding property owners, used their identically zoned property in the same or similar manner, with defendant's longstanding acquiescence, a review of the ordinance must have seemed nothing more than a formality to plaintiffs.

5. The Court cannot envision how, under the facts of this case, plaintiffs would have had a further duty to "inquire and confer" with the local zoning authority to be sure they could use the property the same way it had been historically used and the same way surrounding property owners

used their property, especially in light of the zoning ordinance's seemingly express approval of such use.

6. The Court therefore finds that plaintiffs have met the elements required by *Young* to estop defendant from arguing in this action (or any criminal or administrative action) that plaintiffs' use of their property was not legally conforming to the prior zoning ordinance.

7. The Court finds that plaintiffs have met the requirements to establish a valid pre-existing nonconforming use. UTAH CODE ANN. § 10-9-103(k) states:

> (k) "Nonconforming use" means a use of land that:
>
> (i) legally existed before its current zoning designation;
>
> (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and
>
> (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.

8. The Court's conclusion that the use legally existed before the current zoning is set forth in the prior section. As an independent, but interrelated, grounds for finding the first element required for a non-conforming use, the Court sets forth the following: Under the zoning ordinances in effect at the time plaintiffs purchased their property and began their current use, the property was zoned "C-2." Permitted uses under C-2 include "transfer company." It is the Court's ruling that Hugoe Trucking is a "transfer company" within the meaning of defendant's prior zoning ordinance and that Hugoe Trucking's use of the property was and is consistent with this designation.

9. It has not been argued by the parties, and is thus apparently not at issue, but the Court also finds that the use of the property was "maintained continuously since the time the zoning regulation governing the land changed." There was a period of time when plaintiffs trucks were parked off-site to enable the filling and grading process, yet such would not constitute a "discontinuance." Therefore, to the extent that it is at issue, the Court rules that plaintiffs' use was "maintained continuously since the time the zoning regulation governing the land changed."

10. The third element is not disputed by the parties. Therefore, the Court would find that plaintiffs' current, and past, use of their property to park trucks in conjunction with their trucking business is a legal, non-conforming use.

III. JUDGMENT

The Court hereby enters judgment in favor of plaintiffs. The Court rules that plaintiffs fall within the definition of a "transfer company" under the C-2 zoning in effect at the time plaintiffs purchased the property. Plaintiffs are therefore entitled to continue to use their property in a manner consistent with this designation, including storing and parking trucks in conjunction with plaintiffs' business. The Court permanently enjoins defendant from taking any action to prohibit or prevent plaintiffs from using the property in this manner. Plaintiffs are entitled to recover costs pursuant to applicable court rules.

DATED this 5th day of August, 1998.

BY THE COURT:

Rodney S. Page

Rodney S. Page
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of July, 1998, I caused a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be mailed through United States mail, postage prepaid, to the following:

Michael Z. Hayes
Todd J. Godfrey
Mazuran & Hayes
2118 East 3900 South, Suite B300
Salt Lake City, UT 84124

W \5000\5145\0004\bhbFindingsConclusionsPld wpd

Gregory M. Simonsen (#4669)
Clark B. Fetzer (#1069)
KIRTON & McCONKIE
Attorneys for Plaintiffs
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR

DAVIS COUNTY, STATE OF UTAH

DAMON HUGOE, DEBBIE HUGOE, and HUGOE TRUCKING INC , a Utah corporation, Plaintiffs, vs. WOODS CROSS CITY, a municipal corporation and political subdivision of the State of Utah, Defendant.	COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF Civil No. 960700425 CV Judge RSP $120 pd

Plaintiffs, Damon Hugoe, Debbie Hugoe and Hugoe Trucking, Inc , hereby complain and allege of defendant Woods Cross City as follows:

PARTIES

1. Plaintiffs Damon Hugoe and Debbie Hugoe are husband and wife, residing in West Bountiful, Davis County, Utah.

2. Plaintiff Hugoe Trucking, Inc., is a Utah corporation, with its principal place of business in Woods Cross, Davis County, Utah. Hugoe Trucking, Inc., is owned by Damon Hugoe and Debbie Hugoe. Hugoe Trucking, Inc., is a small trucking company engaged in the business of transporting rock products and rock aggregates.

3. Defendant Woods Cross City is a municipality incorporated under the laws of the State of Utah and as such is a political subdivision of the State of Utah.

4. This court has jurisdiction of this matter pursuant to §§ 78-3-4 and 78-33-1 of the Utah Code. Venue is proper before this court pursuant to §§ 78-13-1 and 78-13-7 of the Utah Code.

GENERAL ALLEGATIONS

5. On or about June 12, 1991, Damon Hugoe and Debbie Hugoe purchased property located in Woods Cross City, Davis County, Utah, more fully described as follows:

> Beginning at a point 238.3 feet West and 181.5 feet South and 627 feet West and North 0°26' East 330 feet and West 235.8 feet from the Northeast corner of Section 26, Township 2 North, Range 1 West, Salt Lake Meridian; and running thence West 65 feet; thence South 670.14 feet to the North line of a street; thence East 65 feet along said street; thence North 670.14 feet to the point of beginning.
> AND
> Beginning at a point 238.3 feet West and 181.5 feet South and 627 feet West and North 0°26' West and North 0°26' East 330 feet and West 105.8 feet from the Northeast corner of Section 26, Township 2 North, Range 1 West, Salt Lake Meridian; and running thence West 65 feet; thence South 670.14 feet to the North line of a street; thence East 65 feet along said street; thence North 670.14 feet to the point of beginning.
> ALSO:
> Beginning at a point 238.3 feet West and 181.5 feet South and 627 feet West and North 0°26' East 330 feet and West 170.8 feet from the Northeast corner of Section 26, Township 2 North, Range 1 West, Salt Lake Meridian; and running thence West 65 feet; thence South 670.14 feet to the North line of a street; thence East 65 feet along said street; thence North 670.14 feet to the point of beginning.

ALSO:
Beginning at a point 238.3 feet West and 181.5 feet South and 660 feet West from the Northeast corner of Section 26, Township 2 North, Range 1 West, Salt Lake Meridian; and running thence North 330 feet; thence West 72.8 feet; thence South 330 feet; thence East 72.8 feet to the point of beginning.

6. Prior to the time the Hugoes purchased the subject property, it was used for an extended period for the storage of large mobile storage containers. Woods Cross City never challenged the property use under the prior owner.

7. The Hugoes purchased the subject property for the primary purpose of having a place for their business, Hugoe Trucking, Inc., to park trucks after hours.

8. When the Hugoes purchased the property, the property was zoned pursuant to Chapter 13 (Commercial Zone C-2) of the Woods Cross City ordinances. Permitted uses in the Commercial Zone C-2 included but were not limited to uses such as transfer companies, trailer sales, automobile sales and rental agencies, public garages (including automobile repair, and body and fender work and painting), police or fire stations, tire shops, and accessory uses and buildings customarily incidental to all such permitted uses. Conditional uses included parking lots incidental to authorized commercial uses, storage buildings and mini-warehouses, service stations and fuel sales offices, and trailer camps for trailers and mobile homes mounted on wheels for ready movement or transport.

9. In August of 1991, the Hugoes applied for a construction permit from Woods Cross City. The permit was to bring fill onto the property, to level the property to enable the Hugoes to park their trucks on the property. At the time the Hugoes applied for the permit, Woods Cross City clearly knew and understood that the purpose of the fill permit was to level the property so that

Hugoe Trucking, Inc., could park its trucks on the property and use it as a yard for their trucking operations. With full knowledge of the intended purpose for the fill, on August 14, 1991, Woods Cross City issued construction permit no 1207 permitting Hugoe to improve its property for the parking of its trucks.

10. Relying upon the zoning ordinance and upon the fill permit, Hugoe Trucking invested significant sums of money in the subject property to make it suitable for parking trucks. Hugoe Trucking has used the subject property continuously for parking its trucks since the issuance of the fill permit in August of 1991.

11. In 1992, Woods Cross City enacted changes to its zoning ordinances Among the changes, Woods Cross changed the zoning of the area where the Hugoes owned their property to Zone I-1. The new I-1 zoning appears to prohibit the Hugoes from using the property to park trucks and related equipment.

12. From the time of the enactment of the new zoning ordinance until August of 1995, Hugoe Trucking continued to use the subject property for parking its trucks. In August of 1995, the City of Woods Cross issued a criminal information against Hugoe Trucking and Debbie Hugoe as its agent for violation of the new Woods Cross Zoning ordinance. The City claims that plaintiffs have committed a Class B misdemeanor by parking their equipment on the property. A true and correct copy of the information is attached hereto as exhibit "A".

13. The purpose.of the City's action is not only to punish Hugoe Trucking and Debbie Hugoe for an alleged criminal violation but also for the purpose of compelling Hugoe Trucking to no longer park its trucks upon the property. A trial on the misdemeanor charge is scheduled for January 2, 1997, at 6:30 p.m., before the Woods Cross City Justice Court.

FIRST CAUSE OF ACTION
(Declaratory Relief)

14. The allegations of the previous paragraphs are hereby incorporated in this cause of action.

15. Pursuant to Utah case law and statutes, including but not limited to § 10-9-408 of the Utah Code and §§ 12-22-102 and 12-22-103 of the Woods Cross City ordinances, the plaintiffs have a vested right in a non-conforming use upon the subject property. Accordingly, the plaintiffs are entitled to continue to use their property for the purpose of parking trucks and equipment incidental thereto and for all other purposes that were proper prior to the zoning change.

16. A prosecution and conviction under the new zoning ordinances would force the plaintiffs to stop parking its trucks on the property. Such a prosecution and conviction would constitute an unconstitutional taking of the property in violation of the Fifth and Fourteenth amendments of the Constitution of the United States and Article I, Section 22 of the Utah Constitution.

17. This Court should issue a declaratory judgment that the subject property carries with it a vested right to carry on the non-conforming use notwithstanding the 1992 zoning change and notwithstanding the efforts of Woods Cross City to criminally prosecute the plaintiffs for violation of the new zoning ordinance.

SECOND CAUSE OF ACTION
(Injunctive Relief)

18. The allegations of the previous paragraphs are hereby incorporated in this cause of action.

19. The plaintiffs, and each of them, will be seriously and irreparably harmed if Woods Cross City is allowed to go forward with its criminal prosecution for violation of the current zoning ordinance. The serious and irreparable harm that would come to the plaintiffs outweighs any benefit that Woods Cross City would obtain in stopping the plaintiffs from parking their trucks on the subject property during the pendency of this action.

20. If Woods Cross City is allowed to go forward with the criminal prosecution for violation of the new zoning ordinance, plaintiffs will be compelled to close their business, inasmuch as they have no other facility to park their trucks and to dispatch their trucks. The plaintiffs will suffer further irreparable damage inasmuch as they will be unable to fulfill existing contracts with third parties. Overall, it is likely that the plaintiffs would be forced to close, never again to be reopened.

21. This Court should first issue a preliminary injunction, preventing the criminal prosecution of the plaintiffs under the new zoning ordinance during the pendency of this action. Such an injunction would not be adverse to the public interest. At the trial of this case, this Court should issue a permanent injunction preventing the City from prosecuting the plaintiffs under the new zoning ordinance. The City should be further enjoined from in any way inhibiting the plaintiffs from parking their trucks or related equipment on the subject property.

WHEREFORE, plaintiffs pray that the Court grant equitable relief as follows:

1. A declaratory judgment that the plaintiffs have a vested right to a non-conforming use on the subject property to continue to use the property for parking trucks and other equipment associated with the business.

2. The court should issue a preliminary and then permanent injunction preventing Woods Cross City from prosecuting the plaintiffs under the new zoning ordinance, or in any way preventing

the plaintiffs from the lawful use of their property in parking trucks and other vehicles associated with the business.

3. For such other and further equitable relief as the Court deems just and proper

DATED this 31 day of December, 1996.

KIRTON & McCONKIE

By _____
Gregory M. Simonsen
Attorney for Plaintiffs

W:\5145\0004\GMSCOMPL.PLD

CHAPTER 13

COMMERCIAL ZONE C-2

11-13-1: USE REGULATIONS. In Commercial Zone C-2, no building or land shall be used, and no building shall be erected which is arranged, intended or designed to be used for other than one or more of the following uses:

(A) PERMITTED USES.

(1) Any permitted use allowed in Commercial Zone C-1.
(2) Apartment hotel; apartment motel.
(3) Automobile and trailer sales.
(4) Awning sales and repair.
(5) Automobile rental agency.
(6) Baths.
(7) Bird store.
(8) Blueprinting or photostating.
(9) Bus depot.
(10) Business college or private school operated as a commercial enterprise.
(11) Cleaning establishment.
(12) Department store.
(13) Dressmaking shop for retail sales at said shop.
(14) Electrical and heating equipment.
(15) Employment agency.
(16) Film exchange.
(17) Fix-it shop.
(18) Flooring or floor repair shop.
(19) Fur sales, storage and/or repair.
(20) Furniture store.

(21) Greenhouse and/or nursery; plant materials, soil and lawn service, provided that all incidental equipment and supplies, including fertilizer and empty cans, etc. are kept within a building.
(22) Hospitals (except animal) or sanitariums.
(23) Hotel.
(24) Ice storage, and retail and wholesale ice stores.
(25) Laundry.
(26) Lodge.
(27) Manufacture of goods to be sold at retail on the premises.
(28) Medical or dental laboratories.
(29) Music conservatory; music instruction.
(30) Mortuary.
(31) Pet shop or taxidermist.
(32) Plumbing or sheet metal supply shop if conducted wholly within a completely enclosed building.
(33) Printing, lithography or publishing.
(34) Public garage, including automobile repairing and incidental body and fender work, painting and upholstering if all operations are conducted wholly within a completely enclosed building.
(35) Police or fire station.
(36) Public services, excepting electric distributing station.
(37) Rescue mission.
(38) Retail stores or businesses.
(39) Second hand store, if conducted wholly within a completely enclosed building.
(40) Sign manufacturing shops, including neon, if conducted wholly within a completely enclosed building.
(41) Studios (except motion picture).
(42) Telephone exchange.
(43) Tire shop operated wholly within a building.
(44) Travel bureau.
(45) Transfer company.
(46) Upholstering shop, if conducted wholly within a completely enclosed building.
(47) Wedding chapel.
(48) Wholesale merchandise broker, excluding wholesale storage.
(49) Accessory uses and buildings customarily incidental to the above.

(B) CONDITIONAL USES.:

(1) Any conditional use permitted in Commercial Zone C-1.
(2) Amusement enterprises, including a billiard or pool hall, bowling alley, dance hall, or theater auditorium.
(3) Boxing arena.
(4) Coal and fuel sales office.

(5) Circus or amusement enterprise of similar type, transient in character.
(6) Electric substation.
(7) Games of skill and science.
(8) Monument works, retail.
(9) Penny arcade.
(10) Planning mill and cabinet shop.
(11) Pony riding ring, without stables.
(12) Shooting gallery.
(13) Small animal hospital.
(14) Storage building for household goods and equipment; mini-warehouses.
(15) Taverns; night clubs; beer parlors.
(16) Temporary revival church.
(17) Trade school, if not objectionable due to noise, odor, vibration, etc.
(18) Trailer camps for trailers and mobile homes mounted on wheels for ready movement or transport.
(19) Veterinary.

* 11-13-2 SPECIAL PROVISIONS. The above specified stores, shops or businesses shall be retail establishments and shall be permitted only under the following conditions:

(A) Such businesses shall be conducted wholly within an enclosed building, or on a lot which is enclosed by a solid wall, board fence or evergreen hedge not less than 6 feet in height, except for the sale of gasoline and oil by service stations, the parking of automobiles, and service to persons in automobiles.

(B) All products produced, whether primary or incidental, shall be sold at retail on the premises; and no entertainment, except music, shall be permitted in cafes, confectioneries, or refreshment stands.

(C) Any exterior sign display shall pertain only to a use conducted within the building or lot or shall appertain to the lease or the sale of the property; such sign shall be attached flat against the wall of the building parallel to its horizontal dimension and shall not exceed 100 square feet in area. One such sign only may be permitted on each wall facing on a street. In no case shall nay such sign employ animation or flashing lights and shall not project above the height of the building more than 36 inches.

11-13-3: AREA AND FRONTAGE REGULATIONS. None, except off-street parking, loading, and unloading spaces, in accordance with Chapter 19, Title XI, of these Revised Ordinances.

11-13-4 YARD REGULATIONS.

(A) Side Yards. For main buildings other than dwellings, none except that wherever a building is built upon a lot adjacent to a residential or agricultural zone boundary, there shall be provided a side yard of not less than 10 feet on the side of the building adjacent to the boundary line, and on corner lots the side yard which faces on the street shall be not less than 30 feet. Accessory dwelling units where windows of such dwelling are provided adjacent to any side lot line, such dwellings shall be provided with a side yard of not less than 10 feet.

(B) Front Yard. The minimum depth of the front yard for all buildings shall be not less than 20 feet; provided, however, that the Planning Commission, as a Conditional Use and after consideration of the location of the proposed building, the shape and size of the lot or area upon which said building would be located, the uses being made of adjoining and nearby properties and the building setback thereon, the landscaping desired thereon, and such other conditions, elements and circumstances as the Planning Commission shall consider appropriate and relevant, may approve a lesser setback not to exceed a variance of more than 50 percent from the setback distance herein set forth. The Planning Commission may also approve an awning, canopy, porch or other structure attached to any such building in the front yard thereof extending to a point, including roof overhang, not closer than one foot from the street line, subject to the considerations herein mentioned and to the further consideration that prior to approval, the Planning Commission shall determine that the proposed awning, canopy, porch or other attachment to such building shall not unreasonably restrict visibility or sight clearance across the major portion of the front yard required by this Section or as otherwise modified by the Planning Commission in accordance with the provisions and requirements hereof. All billboards and other signs having less than 10 feet clearance between the ground and sign shall be required to have the same front yard as is required of buildings and other structures.

(C) Rear Yard. The minimum rear yard for all buildings shall be 15' feet.

11-13-5 HEIGHT REGULATIONS. The maximum permitted height of buildings shall not exceed two and one-half stories of 35 feet, provided that the Planning Commission, as a Conditional Use and after consideration of the location of the proposed building, the plans for incorporation of an approved fire protection

*Amended 11-13-4(B) - Ordinance #231 4/6/82

sprinkling system therein, the shape and size of the lot or area upon which said building would be located, the uses being made of adjoining and nearby properties and such other conditions, elements and circumstances as the Planning Commission shall consider appropriate and relevant, may allow a greater height or greater number of stories in said building.

11-13-6: COVERAGE REGULATIONS. No building or structure or group of buildings, with their accessory buildings, shall cover more than 60 percent of the area of the lot.

11-13-7 FENCING. On lots containing mainbuildings other than single-family dwellings fences may be required along the side and/or rear lot lines by the Planning Commission. However, for topographical, architectural, structures or other reasons, fencing may be waived in whole or in part. Where fences are required by the Planning Commission, they shall be either the solid or open mesh type with a minimum height of 4 feet and a maximum height of 6 feet. Fences along the side lot lines shall extend from any required front yard setback to the rear of the lot, but fences may be constructed along the side lot lines in the front yard not to exceed 2 feet in height if the solid type or 4 feet if the open mesh type.

11-13-8: BOND. A corporate surety or cash bond, or letter of credit from a land title company licensed to do business in the State of Utah, or from a bank, savings and loan association or other financially responsible lending institution, in an amount equal to 2 percent of the construction costs of each and every principal building constructed on the lot, other than a single-family dwelling, shall be required to guarantee the completion of all site development, including, among other things, the landscaping, sprinkling systems, driveways, parking areas, sidewalks and curb and gutter; provided, however, that the City Council, after recommendation by the Planning Commission, may accept other security sufficient to guarantee such installation.

11-18-8: FENCING REGULATIONS. Except where fences of a specified type or height are required by the Planning Commission as provided elsewhere in this Ordinance, a fence, lattice work, screen or wall, not more than six feet in height, or a hedge or thick growth of shrubs or tree maintained so as not to exceed six feet in height, may be located in any required side or rear yard behind the front yard setback. On corner lots a solid type fence, hedge, thick growth of shrubs or trees shall not be allowed over two feet high, closer than 25 feet from property lines at intersections.

(A) For residential zones, in any required front yard or any required side yard on corner lots an open type fence not exceeding four feet in height, which must be maintained to permit clear, unobstructed visibility may be allowed, provided that this provision shall not be so interpreted as to prohibit the erection of an open mesh type fence enclosing elementary or secondary school sites.

(B) Any grading, planting, or construction in residential areas that interferes with the vision of those using the streets, sidewalks, alleys or driveways is prohibited.

(C) A solid type fence is one that, in the opinion of the inspecting authority, is closed sufficiently to block the view of traffic.

(D) Certain other fences, such as tennis court backstops or patio enclosures in the front, side, or rear yards, may be approved by the inspecting authority if, in his opinion, they do not create a hazard or violation of other Ordinances.

11-18-9: SITE PLAN. In any commercial or manufacturing zone, and in all zones where construction of main buildings or dwellings other than single-family dwellings is proposed or involved, the location of main and accessory buildings on the site and in relation to one another, the traffic circulation features within the site, the height and bulk of buildings, the provision for off-street parking space, the provision for driveways for ingress and egress, and for the installation of curb, gutter and/or sidewalk when not already in place along the street bordering, and provision for other open space on the site, and the display of signs shall be in accordance with a site plan or plans or subsequent amendment thereof, approved in any case by the Planning Commission prior to issuance of a Building or Land-Use Permit. In approving site plans the Planning Commission may act on a site plan submitted to it or may act on its own initiative in proposing and approving a site plan, including any conditions or requirements designated or specified on or in connection therewith. A site plan shall include landscaping, fences, and walls designed to further the purposes of the regulations for commercial, industrial, and residential zones with two or more family dwelling units and such features shall be provided and maintained as a condition of the establishment and maintenance of any use to which they are appurtenant. In considering any site plan hereunder the Planning Commission shall endeavor to assure safety and

convenience of traffic movements both within the area covered and in relation to access streets, harmonious and beneficial relation among the buildings and uses in the area covered, and satisfactory and harmonious relation between such area and contiguous land and buildings and adjacent neighborhoods.

All persons required to file a site plan under the provisions of this Section shall, at the time of the filing thereof, pay to the City a fee of $10.00 per acre, or any portion thereof, contained within the area covered by the site plan, with a minimum fee of $25.00, the same to cover part of the cost of processing and reviewing said site plan; provided, however, that said fee may be changed from time to time by Resolution of the City Council.

*Amended 11-18-9 - Ordinance #257 8/21/84